No. 85-1222

Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

H. GLENN SCAMMEL
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1846

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Section 10505 of the Interstate Commerce Act requires ICC to exempt "transportation provided by a rail carrier" from regulation when the ICC finds that certain statutory criteria are met. The ICC (with the approval of another panel of the United States Court of Appeals for the Fifth Circuit) exempted from regulation interstate trailer-on-flatcar and container-on-flatcar (TOFC/COFC) rates and service, including the truck portion of such service, when it is provided by a railroad in its own trucks. Sections 10501 and 11501 of the Act explicitly pre-empt state regulatory authority over such "transportation" and mandate that states may be delegated to regulate it, if at all, in accordance with uniform federal standards. Under settled precedent, ICC decisions (including exemptions) are fully applicable to intrastate "transportation" under these pre-emptive provisions. The questions presented are:

(1) Whether the court of appeals erred by equating intrastate transportation service performed in railroad-owned trucks with "motor carriage" as defined in the Interstate Commerce Act, and accordingly holding that the ICC's jurisdiction to exempt "transportation provided by a rail carrier" is narrower for *intrastate* TOFC/COFC service provided by interstate rail carriers than for identical *interstate* service by the same carriers and is instead limited to transportation on rail cars, contrary to prior decisions of this and other courts.

(2) Whether any interpretation of the ICC's statutory jurisdiction in such a way as to define

"transportation provided by a rail carrier" differently for interstate and intrastate service is fundamentally incompatible with the express scheme of the Staggers Act—that such transportation be regulated to the same extent and under the same standards whenever provided by a carrier subject to ICC regulation, regardless of whether the service involved is interstate or intrastate.

PARTIES TO THE PROCEEDING

The following parties appeared in the proceedings before the court of appeals:

Missouri-Kansas-Texas Railroad Company
Southern Pacific Transportation
Road-Rail Company
Missouri Pacific Railroad Company
Interstate Commerce Commission
United States of America

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Statement	2
Reasons For Granting The Petition	11
Conclusion	20

TABLE OF AUTHORITIES

CASES:

American Trucking Ass'ns v. *A.T. & S.F. Ry. Co.*, 387 U.S. 397 (1967) 13

American Trucking Ass'ns v. *ICC*, 656 F.2d 1115 (5th Cir. 1981) 4, 5, 15

Hansen v. *Norfolk & Western Ry. Co.*, 689 F.2d 707 (7th Cir. 1982) 16

ICC v. *Coal Exporters Ass'n*, 105 S. Ct. 2151 (1985) 11

Illinois Central Gulf R.R. v. *ICC*, 702 F.2d 111 (7th Cir. 1983) 19

Illinois Central Gulf R.R. v. *ICC*, 720 F.2d 958 (7th Cir. 1983) 8

Illinois Commerce Commission v. *ICC*, 749 F.2d 875 (D.C. Cir. 1984) 8, 9, 17, 20

Improvement of TOFC/COFC Regulation, 364 I.C.C. 73 (1981) 4

Indianapolis Power & Light Co. v. *ICC*, 687 F.2d 1098 (7th Cir. 1982) 7

Magner-O'Hara Scenic Ry. v. *ICC*, 692 F.2d 441 (6th Cir. 1982) 19, 20

Montana Intrastate Freight Rates and Charges—1977, 357 I.C.C. 281 (1978) 6

Montana Intrastate Rail Freight Rates and Charges, 353 I.C.C. 207 (1976) 6

CASES—Continued: Page

Public Service Co. of Indiana v. *ICC*, 749 F.2d 753 (D.C. Cir. 1984) 16
Rail General Exemption Authority-Fresh Fruit and Vegetables, 361 I.C.C. 374 (1979) 2
Railroad Commission of Texas v. *ICC*, 765 F.2d 221 (D.C. Cir. 1985) 8, 18
State Intrastate Rail Rate Authority—P.L. 96-448, 367 I.C.C. 149 (1983) 17
State Intrastate Rail Rate Authority-Texas, 1 I.C.C. 2d 26 (1984) 12
State of Texas v. *United States*, 730 F.2d 339 (5th Cir. 1984) 8, 9, 19
State of Texas v. *United States*, 730 F.2d 409 (5th Cir. 1984) 18
Thomson v. *United States*, 31 U.S. 19 (1944) 13
Utah Power & Light Co. v. *ICC*, 747 F.2d 721 (D.C. Cir. 1984) 8, 18, 19
West Virginia Intrastate Rates and Charges, 1973, 355 I.C.C. (1977) 6
Wheeling-Pittsburgh Corp. v. *ICC*, 723 F.2d 346 (3d Cir. 1983) 19

STATUTES:

Interstate Commerce Act:
49 U.S.C. 10101a(3) 6
49 U.S.C. 10101a(9) 6
49 U.S.C. 10501 9
49 U.S.C. 10501(d) 11
49 U.S.C. 10505 ..... *passim*
49 U.S.C. 10505(a) 4, 5
49 U.S.C. 10505(f) 4, 5
49 U.S.C. 10521 ..... 10, 13
49 U.S.C. 10521(b) 11
49 U.S.C. 11501(b)(1) 8, 11
49 U.S.C. 11501(b)(4)(B) 9, 11
49 U.S.C. 11501(c) 10
49 U.S.C. 10701a 3, 12
49 U.S.C. 10707a 3
49 U.S.C. 10709 3
Act of October 7, 1978, Pub. L. 95-473, 94 Stat. 1444 6

STATUTES—Continued: Page

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 21 2
Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 ..... 3, 6

REGULATIONS:

49 C.F.R. 1039.13 (1984) 9, 15, 18

LEGISLATIVE HISTORY:

H.R. Rep. No. 96-1035, 96th Cong. 2d Sess. (1980) 3, 7, 11, 15
H. Conf. Rep. No. 96-1430, 96th Cong. 2d Sess. (1980) 3, 6, 8
126 Cong. Rec. H 10085 (daily ed., Sept. 30, 1980) 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Interstate Commerce Commission petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a, *infra*) is reported at 770 F.2d 452 (1985). The decisions of the Interstate Commerce Commission (App. 16a, 24a, *infra*) are unreported.

JURISDICTION

The judgments of the court of appeals (App. 8a, 10a, *infra*) were entered on September 6, 1985. A subsequent order (App. 12a, *infra*) denying rehearing and rehearing *en banc* was entered on November

15, 1985. The court of appeals also stayed its mandate through January 21, 1986 (App. 14a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 10101a, 10501, 10505, 11501, and 10521 are set forth at App. 30a, *infra*.

STATEMENT

1. This case concerns the application to intrastate transportation provided by interstate rail carriers of an exemption from regulation granted by the Interstate Commerce Commission under 49 U.S.C. 10505. Under Section 10505, the Commission "shall exempt" rail transportation "when the Commission finds that the application of a provision of this subtitle . . . is not necessary to carry out the transportation policy of section 10101a" and either the rail transaction or service "is of limited scope" or the application of the statute "is not needed to protect shippers from the abuse of market power." 49 U.S.C. 10505(a).

The duty to carry deregulation of rail transportation beyond the areas expressly removed from the ICC jurisdiction by statute was first imposed on the Commission in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, § 207, 90 Stat. 21 (1976), which was enacted in an attempt to remedy the rail industry's precarious financial condition.[1] Originally, the stat-

[1] The Commission exercised the power by exempting rail movements of fresh fruit and vegetables, which were subject to intense motor carrier competition. *Rail General Exemption Authority-Fresh Fruit and Vegetables*, 361 I.C.C. 374 (1979).

ute allowed only exemptions of services or transactions by reason of "the[ir] limited scope." Ibid. The 4R Act's reforms were inadequate to remedy the rail industry's financial problems, however. Congress therefore enacted more sweeping reforms in the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 *et seq.* (1980).

Those reforms included further eliminating by statute the Commission's jurisdiction over specified aspects of rail transportation,[2] and as relevant here, expanding the exemption power beyond rail matters of "limited scope" and specifically directing the Commission to use that power to deregulate in areas beyond those explicitly deregulated by the statute. The legislative history of the exemption provision confirms that the Commission was to remove "as many as possible of the Commission's restrictions on changes in prices and services" and to "adopt a policy of reviewing [rail] carrier actions after the fact to correct abuses of market power." H.R. Conf. Rep. 96-1430, 96th Cong. 2d Sess. 105 (1980). Regulation was to be reduced to the levels necessary "to protect against abuses of market power where other federal remedies are inadequate for this purpose." *Id.* Congress viewed the mandate to exempt additional aspects of rail transportation as an "important cornerstone" of the Staggers Act and a key element in the effort to obtain greater reliance on the marketplace. H.R. Rep. 96-1035, 96th Cong., 2nd Sess. 60

---

[2] For example, Congress further confined the Commission's jurisdiction to non-competitive ("market dominant") rates (49 U.S.C. 10701a and 10709). It also created a zone within which rates are insulated from regulation, and a fast mechanism for railroads to recover cost increases without regulatory interference (Section 10707a).

(1980). As the Act's sponsor and namesake confirmed on the floor of the House (126 Cong. Rec. H10085 (daily ed. Sept. 30, 1980) (emphasis added)):

> This legislation . . . is to be a first step toward treating the American railroad industry as any other business which is best "regulated" by the marketplace.
>
> The exemption authority has been carefully drafted to limit regulation to the bare essentials necessary to protect against abuse of market power. *It is the intent of the conference committee that this standard would permit the exemption of any provision in the act, except as specified in the exemption section.*

The Commission's first post-Staggers Act exercise of the expanded exemption power was in an area to which Congress had specifically adverted (in 49 U.S.C. 10505(f)) as appropriate for exemption—railroad-provided intermodal transportation. *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 73 (1981). That first step was substantially affirmed in *American Trucking Ass'ns v. ICC*, 656 F.2d 1115 (5th Cir. 1981) ("*ATA II*").

The ICC rested its 1981 TOFC/COFC exemption decision on the statutory language in the Staggers Act's exemption provision, which permits exemption of any "matter relating to a rail carrier providing transportation," 49 U.S.C. 10505(a), and explicitly encompasses "transportation that is *provided by a rail carrier* as part of a continuous intermodal movement," 49 U.S.C. 10505(f) (emphasis added).

Those challenging the exemption rule contended, *inter alia*, that the exemption was invalid because

the Commission's exemption authority applied only to rail carriage, and that the agency had no authority to exempt motor carriage. Relying on 49 U.S.C. 10505(f),[3] however, the *ATA II* decision unequivocally rejected this contention, holding (656 F.2d at 1120) that:

> rail-owned truck TOFC/COFC service is "transportation provided by a rail carrier." Had Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language. Instead, it chose the broad "transportation-that-is-provided-by-a-rail-carrier" language and presumably did so with knowledge that it previously had defined "transportation" to include the movement of passengers or property by motor vehicle [citations and footnote omitted].

2. Besides broadening the Commission's exemption powers, the Staggers Act fundamentally altered the boundary between state and federal regulation of rail transportation.

Before the Staggers Act, the state regulatory bodies had initial responsibility for intrastate rail regulation, and the Commission could preempt a state's authority and prescribe an intrastate rate, after a hearing, in only two situations: (1) when an intrastate rate required by the state unjustly discriminated against or imposed an undue burden on inter-

---

[3] Section 10505(f) provided that: "The Commission may exercise its authority under this section to exempt *transportation that is provided by a rail carrier* as part of a continuous intermodal movement" (emphasis added). The *ATA II* court also held the TOFC exemption to be a "matter related to a rail carrier" under Section 10505(a), and thus within the ICC's lawful exemption authority.

state commerce; or (2) when the state was dilatory in acting upon a proposed intrastate rate change. See Section 13(4) of the former Interstate Commerce Act, recodified as 49 U.S.C. 11501 by the Act of October 7, 1978, Pub. L. No. 95-473, 94 Stat. 1444. The ICC usually exercised its Section 11501 powers when railroads sought relief after state agencies refused to authorize intrastate rate increases commensurate with ICC-approved interstate general increases.[4] In those cases, the Commission generally awarded relief from the intrastate rate holddowns.

In the Staggers Act, Congress adopted a new rail transportation policy aimed at eliminating burdensome government regulation and "allowing rail carriers to earn adequate revenues, *as determined by the Interstate Commerce Commission*" (emphasis added). 49 U.S.C. 10101a(a)(3). This new policy also requires the Commission "to assure that intrastate regulatory jurisdiction is exercised in accordance with the [federal] standards." 49 U.S.C. 10101a(a)(9). To implement this directive, Congress enacted Section 214 of the Staggers Act[5] "to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals." H.R. Conf. Rep. No. 96-1430, *supra* at 106.

Congress concluded that burdensome state regulatory policies had prevented intrastate traffic from

---

[4] See *e.g.*, *Montana Intrastate Freight Rates and Charges—1977*, 357 I.C.C. 281 (1978); *Montana Intrastate Rail Freight Rates and Charges*, 353 I.C.C. 207, 213 (1976); *West Virginia Intrastate Rates and Charges, 1973*, 355 I.C.C. 823 (1977).

[5] Pub. L. 96-448, 94 Stat. 1913 (1980).

paying its "fair proportionate share" of the cost of the national railroad system. The House Commerce Committee estimated, for example, that the nationwide disparity between intrastate and interstate rates cost rail carriers $400 million in 1977 alone. H.R. Rep. No. 96-1035, *supra* at 61. That disparity had two basic causes. First, the regulatory standards and procedures of the various states differed substantially from one another and from those of the Commission. *Id.* at 128-30. As a result, the railroads often obtained a substantial increase in interstate rates from the Commission, only to have the same increase denied by state regulatory authorities on intrastate movements.

A second and more basic cause of the disparity was sheer regulatory delay. Even though the 4R Act had required state agencies to act on rate matters within 120 days, state activities nevertheless resulted in revenue drains on the carriers, because even when the Commission eventually overturned a state decision holding down rates, the railroad still lost revenues from the time lag involved. *Id.* at 61.

As summarized by the Seventh Circuit, "[t]he Staggers Rail Act . . . effected a basic change in the regulatory spheres of state agencies and the ICC. Congress perceived a great disparity between interstate and intrastate rail rates, caused partly by a lack of uniform standards and partly by state regulatory delay [footnote omitted]." *Indianapolis Power and Light Co. v. ICC*, 687 F.2d 1098, 1100 (7th Cir. 1982).

In particular, the Staggers Rail Act amended the Interstate Commerce Act to provide that "a State authority may only exercise jurisdiction over intrastate *transportation provided by a rail carrier* . . .

if such State authority exercises such jurisdiction exclusively in accordance with" the Interstate Commerce Act. 49 U.S.C. 11501(b)(1) (emphasis added). Certification is the means by which states may opt to exercise delegated jurisdiction to administer the regulatory standards of the Interstate Commercial Act. States must "either . . . regulat[e] in compliance with federal law or . . . cease independent regulation altogether." *State of Texas v. United States*, 730 F.2d 339, 353 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 267 (1984). Accord, *Illinois Commerce Commission v. ICC*, 749 F.2d 875, 878 n. 5 (D.C. Cir. 1984), *cert. denied*, 106 S. Ct. 70 (1985). See H. Conf. Rep. No. 96-1430, 96th Cong. 2d Sess. 83 (1980): "State authority over intrastate [rail] transportation is limited to administering the provisions of the Interstate Commerce Act."

Until May, 1984, the Railroad Commission of Texas (RCT) was provisionally certified, pending ICC action on its application for final certification.[6] States certified (finally or provisionally) to administer the Interstate Commerce Act are bound to follow and apply federal "standards and procedures." 49 U.S.C. 11501(b)(1).

Only certified states are permitted to regulate "transportation provided by a rail carrier." 49 U.S.C. 11501(b)(1),(4)(A). If a state does not receive federal certification, "[a]ny intrastate trans-

---

[6] For a description of the legal effect of provisional certification, see *Illinois Central Gulf R.R. Co. v. ICC*, 720 F.2d 958 (7th Cir. 1983); *Utah Power & Light Co. v. ICC*, 747 F.2d 721, 726 (D.C. Cir. 1984), *supplemented on rehearing*, 764 F.2d 865 (D.C. Cir. 1985); *Railroad Commission of Texas v. ICC*, 765 F.2d 221, 227-8 n.5 (D.C. Cir. 1985).

portation provided by a rail carrier . . . shall be deemed to be transportation subject to the jurisdiction of the Commission under [Sections 10501 *et seq.*]" 49 U.S.C. 11501(b)(4)(B). Thus, while certified states are permitted to exercise *delegated* pre-emptive jurisdiction (using uniform federal standards) "as a matter of legislative grace," [7] a state that fails to obtain federal certification must "cease independent regulation altogether" [8] and is pre-empted as to the full extent of intrastate transportation provided by interstate rail carriers. *Illinois Commerce Commission, supra*, 749 F.2d at 878 n.5.

Two major themes of the Staggers Act—deregulation through exemption and state-federal uniformity of standards through pre-emption—reached a confluence in the present case. The TOFC/COFC exemption, granted by the ICC in 1981, was repudiated in part by the Railroad Commission of Texas (RCT). Specifically, RCT refused to recognize the ICC's federal regulation [9] as exempting the entire intrastate TOFC/COFC movements of major interstate rail carriers, Missouri-Kansas-Texas Railroad Company (MKT), Burlington Northern Railroad Company (BN), Southern Pacific Transportation Company (SP), and Road Rail Corporation. Instead the RCT stated that only the rail portions of such intermodal movements would be deemed exempt.

The affected interstate rail carriers then invoked the expedited administrative review procedure of 49

---

[7] *Illinois Commerce Commission, supra*, 749 F.2d at 878.

[8] *State of Texas, supra*, 730 F.2d at 353.

[9] By its terms, the TOFC/COFC exemption as codified in the ICC's regulations encompasses "[r]ailroad and truck transportation provided by a rail carrier as part of a continuous intermodal movement." 49 C.F.R. 1039.13 (1984).

U.S.C. 11501(c) to seek redress from the ICC. In two separate orders, the Commission held that the full scope of the pre-existing federal TOFC/COFC exemption was a "federal standard" fully binding on RCT under the pre-emptive scheme of the Staggers Act (App. 16a-23a, 24a-29a, *infra*). RCT then sought review in the Fifth Circuit.

3. The court of appeals reversed the Commission's orders, holding that "exemption from state and federal regulation [of] intrastate trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) activity done in conjunction with intrastate rail transportation . . . went beyond the scope of the [ICC's] authority granted by Congress" (App. 2a, *infra*). The court of appeals began with the premise that the "predicate" for ICC jurisdiction is "the interstate or foreign aspect of rail transportation" (App. 4a, *infra*), observing that the statutory provision conferring "motor carrier" jurisdiction [10] upon the ICC "totally excludes intrastate motor carrier transportation" (App. 4a, *infra*). While assertedly recognizing that the Staggers Act had "given [the ICC] jurisdiction over intrastate rail traffic," the court refused to recognize any ICC authority "to exempt intrastate trucking connected with intrastate rail travel" (App. 6a, *infra*).

The principal rationale advanced by the court of appeals for excising the motor portion of an intrastate TOFC/COFC movement from pre-emptive federal authority was that a "small intrastate rail carrier" could provide "transportation by motor carrier across the entire State of Texas, except for a few [rail] miles" within San Antonio, "but be completely

---

[10] 49 U.S.C. 10521.

free of regulation by state authorities" (App. 7a, *infra*). The court again relied on 49 U.S.C. 10521 (b)(1), which preserves the "power of State to regulate transportation provided by a motor carrier" (App. 7a, *infra*). The court of appeals never mentioned Sections 10501(d) or 11501(b)(4)(B), despite the expressly preemptive language of these provisions.

The Commission and the United States, as well as the affected carriers, petitioned for rehearing *en banc*. These petitions were denied by the Fifth Circuit on November 15, 1985 (App. 12a, *infra*).

REASONS FOR GRANTING THE PETITION

1. The Staggers Act is intended to promote a new regime of less stringent regulation of the railroad industry. Two of the most important means provided by Congress to achieve this goal were the ICC's expanded exemption power, 49 U.S.C. 10505 (an "important cornerstone" [11] of the Act) and the pre-emptive mandate to assure that both interstate and intrastate traffic are regulated "exclusively" under uniform federal "standards and procedures," 49 U.S.C. 10501(d), 11501(b)(1). The court of appeals' decision thwarts the effective use of these deregulatory tools by permitting a narrower, state-determined jurisdictional definition of "transportation provided by a rail carrier" to limit the scope of uniform federal standards for intrastate TOFC/COFC shipments by

---

[11] H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 60 (1980). The exemption power is the "key mechanism" by which the "deregulatory mandate of the Staggers Act" is to be implemented. *ICC v. Coal Exporters Ass'n*, 105 S. Ct. 2151, 2152 (1985) (White & Rehnquist, JJ., dissenting).

interstate rail carriers. Because uniformity of the jurisdictional boundary, erroneously redrawn by the court of appeals, is fundamental to the administration of the Interstate Commerce Act at both the interstate and intrastate levels, review by this Court is necessary to prevent the state-sponsored dismemberment of the uniform regulatory standards and basic deregulatory exemptions mandated by Congress in the Staggers Act. The Fifth Circuit's ruling also places that court in conflict with prior decisions of the Sixth, Seventh and District of Columbia Circuits on the scope of the TOFC/COFC exemption and on the pre-emptive reach of the Staggers Act.

Review of the erroneous ruling below is especially necessary here. Because the court of appeals cast its ruling as a jurisdictional limit on the Commission's statutory power, there is no other means available to the Commission to redress or mitigate the damage caused by the Fifth Circuit's ruling. Moreover, inasmuch as Texas has been denied federal certification to administer the regulatory standards of the Interstate Commerce Act,[12] the ICC is not even able to readdress the matter in the exercise of its supervisory jurisdiction, 49 U.S.C. 11501(b), (c). And since the critical jurisdictional language ("transportation provided by a rail carrier") recurs throughout the federal statute,[13] the damaging effect of the Fifth Circuit's ruling is not confined to TOFC/COFC traffic or to pre-empted intrastate rail jurisdiction.

---

[12] See *State Intrastate Rail Rate Authority-Texas*, 1 I.C.C.2d 26 (1984), *aff'd sub nom. Railroad Commission of Texas v. ICC*, 765 F.2d 221 (D.C. Cir. 1985).

[13] *See, e.g.*, 49 U.S.C. 10701(a) (requirement that rates be reasonable); 10701a(a) (carrier control over rate-setting); 10701a(c) (standard for minimum rates).

2. The court of appeals erroneously equated the movement of a trailer or container by railroad-owned trucks as part of a through service with "motor carrier transportation" (App. 4a, 7a, *infra*) citing 49 U.S.C. 10521, the ICC's general jurisdiction over interstate motor carriers. In so doing, the court of appeals ignored the settled principle, approved in prior decisions of this Court, that through service performed in part in railroad-owned trucks is not "motor carriage" within the meaning of the federal statute.

Long before the Staggers Act, the Interstate Commerce Act embodied a fundamental distinction between "rail carriers" and "motor carriers." The latter, in fact, were added to the ICC's regulatory judgdiction only in 1935, almost fifty years after the Commission's original rail jurisdiction was established by Congress. This Court early recognized, for example, that a railroad may use trucks as part of a "single complete freight transportation service to and from all points on its lines" without becoming a motor common carrier within the meaning of the Interstate Commerce Act. *Thomson v. United States*, 321 U.S. 19, 24-25 (1944).

Later, as use of continuous truck-rail movements under railroad control increased, this Court sustained the ICC's assertion of regulatory authority over "piggyback" rail service, the forerunner of TOFC/COFC movements, *American Trucking Ass'ns v. A.T. & S.F. Ry. Co.*, 387 U.S. 397, 420-21 (1967) ("*ATA I*"), recognizing that:

> Railroads are not now confined to rails. They operate trucks. They are permitted to assemble cargo and, if they so desire, to use their own trucks or subsidiary companies to do so.

Thus, even without considering the broader "transportation-provided-by-a-rail-carrier" language of the Staggers Act, the court of appeals' decision is fundamentally erroneous and contrary to prior decisions of this Court, because it fallaciously equates railroad-owned truck connecting service with "motor carriage."

3. As one of its most basic goals in the Staggers Act, Congress sought to assure that uniform regulatory standards would be applied to all railroad transportation, intrastate and interstate. The action of the court of appeals in this case subverts this congressionally intended uniformity at its very core—the basic jurisdictional definition of "transportation provided by a rail carrier." If a state agency such as RCT (and an uncertified one at that) may remove part of a continuous railroad-provided transportation service from federal jurisdiction by redefining it as "motor carriage," then the statute (and the growing body of precedent) holding certified states bound by the federal standards (as well as ICC regulations and case law) is meaningless: the state may simply avoid application of the federal standards by altering its reading of "transportation provided by a rail carrier" to suit its own preferences and sensibilities. Moreover, if railroad-owned trucks are considered not to be engaged in "transportation provided by a rail carrier" when they connect with rail service in a continuous intermodal movement, two disparate regulatory regimes are then imposed on identical railroad-provided transportation service, depending solely upon whether the destination lies beyond a state border. Such a duality of regulatory standards is precisely what Congress intended to eradicate in the Staggers Act.

The TOFC/COFC exemption and the "transportation provided by a rail carrier" it addresses include rail and truck service furnished by a rail carrier as part of a continuous intermodal movement. 49 C.F.R. 1039.13 (1984); *ATA II*, *supra*, 656 F.2d at 1120 & n.5. The Commission's exemption power, as expanded by the Staggers Act, explicitly extends to such continuous intermodal service. 49 U.S.C. 10505(f).[14]

The unitary "provided-by-a-rail-carrier" nature of ICC jurisdiction over TOFC/COFC traffic (truck and rail) has been twice confirmed in recent judicial decisions. First, the Fifth Circuit upheld the original exemptive regulations in *ATA II* (656 F.2d at 1120), holding Section 10505(f) to mean that:

> rail-owned truck TOFC/COFC service is "transportation provided by a rail carrier." Had Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language. Instead, it chose the broad "transportation-that-is-provided-by-a-rail-carrier" language and presumably did so with knowledge that it previously had defined "transportation" to include the movement of passengers or property by motor vehicle [citations and footnote omitted].

Later the Seventh Circuit affirmed a ruling that a dispute over the lawfulness of railroad-affiliated *truck*

---

[14] Indeed, the TOFC/COFC exemption, already proposed but not adopted at the time of the congressional deliberations on the Staggers Act, was specifically mentioned in the House report as evidence that the "Commission has proceeded on a sound basis given the existing statutory restrictions, easing unnecessary regulatory restrictions and providing an improved competitive environment." H.R. Rep. No. 96-1035, *supra*, at 60.

service conducted under color of the TOFC/COFC exemption was within the primary jurisdiction of the ICC, since the exemption encompasses "*rail* and *truck* transportation *provided* by a rail carrier." *Hansen v. Norfolk & Western Ry. Co.*, 689 F.2d 707, 712 (7th Cir. 1982) (emphasis added). The *Hansen* decision, like *ATA II*, recognized that the basic statutory test for TOFC/COFC exemption coverage is whether the transportation is "provided" by a rail carrier. 689 F.2d at 712 n.5. Thus, two courts of appeals have previously recognized that the providing of the service by a rail carrier—not the physical location of the trailer or container on rails or a highway—determines the jurisdictional status of the transportation. Yet the decision below contradicts both of those prior decisions by limiting the coverage of the statute to the rail segment of the journey only.

4. The decision below held that "transportation provided by a rail carrier" has a narrower meaning as to intrastate TOFC/COFC traffic than as to interstate traffic of the same type (App. 5a-6a, *infra*). Yet the District of Columbia Circuit held in *Public Service Co. of Indiana v. ICC*, 749 F.2d 753, 769 (D.C. Cir. 1984), *cert. denied*, 106 S. Ct. 278 (1985), that even where the ICC has not issued any implementing regulations, the Staggers "Act itself established federal standards that must be observed" (citations omitted). The uniform meaning of substantive statutory provisions as upheld in *Public Service* cannot be squared with the Fifth Circuit's creation of a separate and narrower definition of "transportation provided by a rail carrier" solely for intrastate movements.

5. The disparity in treatment of intrastate and interstate TOFC/COFC service mandated by the decision below also conflicts with a prior decision of the

District of Columbia Circuit in *Illinois Commerce Commission, supra.* There the state agency disputed the ICC's authority to require the state to give "immediate and automatic effect to federal exemptions." 749 F.2d at 884. Specifically, the state claimed independent authority to decide whether intrastate TOFC/COFC traffic would be regulated or exempt. *State Intrastate Rail Rate Authority—P.L. 96-448*, 367 I.C.C. 149, 152-53 & n.11 (1983).[15] The ICC expressly found that differing treatment for intrastate and interstate TOFC/COFC movements would cause "practical problems and inconsistencies" that "could not have [been] intended" by Congress and "would cause unjustifiable operational and/or marketing difficulties for the railroads conducting business for the same class of traffic under both a regulated and unregulated environment." 367 I.C.C. at 153. The essential "competitive dynamic" underlying a class exemption such as TOFC/COFC is the same, whether the destination is intrastate or interstate. *Id.*

The District of Columbia Circuit upheld the ICC's ruling on the exemption issue as a "reasonable interpretation" of the Staggers Act to avoid "continued State regulation that would frustrate federal deregulation efforts pursuant to an exemption order." *Illinois, supra*, 749 F.2d at 883. This holding cannot be squared with the decision below, which reserves to Texas not only independent discretion over part of a federally exempted movement, but allows the state to

---

[15] Illinois merely claimed the authority to grant or deny an intrastate TOFC/COFC exemption using *federal* Section 10505 statutory criteria. 367 I.C.C. at 152. RCT (and now the Fifth Circuit), on the other hand, asserted that *state* law (and hence plenary state jurisdiction) applies to the motor segment of a TOFC/COFC movement.

exercise that discretion without regard to any federal law—something that even Illinois never asserted the power to do. (See note 15, *supra.*) If a certified Illinois lacks the legal authority under the Staggers Act to reevaluate a federal exemption using federal (Section 10505) criteria, then an uncertified Texas *a fortiori* cannot repudiate a portion of the exemption in reliance upon state law.

6. The TOFC/COFC exemption as adopted by the ICC is a codified federal regulation, 49 C.F.R. 1039.13 (1984). The decision below holds that regulation nonbinding as to RCT's authority to regulate railroad-owned trucks participating in continuous intrastate TOFC/COFC movements on the "highway portion of the travel" (App. 2a-3a, *infra*). Thus, the scope of the federal regulation is severely reduced as to intrastate traffic. That holding is contrary to several earlier court of appeals decisions holding that all substantive ICC regulations (as well as statutory provisions and decisional precedent) are binding on certified [16] states. All ICC substantive regulations are binding on certified states. *State of Texas v. United States*, 730 F.2d 409, 418-19 (5th Cir. 1984), *amended on rehearing*, 749 F.2d 1144 (5th Cir. 1985), *cert. denied*, 105 S.Ct. 3513 (1985) (contract rate rules applicable on intrastate traffic); *Utah Power & Light Co. v. ICC*, 747 F.2d 721, 736-37 (D.C. Cir. 1984), *supplemented on rehearing*, 764 F.2d 865 (D.C. Cir. 1985) (revenue adequacy regulations binding on states). Even ICC adjudicatory precedent must be followed by cer-

[16] As noted earlier, RCT was provisionally certified when the present case arose but had been denied certification (and hence ousted from intrastate rail jurisdiction) when the Fifth Circuit heard the case. See App. 3a, *infra*, n.1; *Railroad Commission of Texas* v. *ICC, supra.*

tified states. *Illinois Central Gulf R.R. Co. v. ICC*, 702 F.2d 111 (7th Cir. 1983); *Wheeling-Pittsburgh Corp. v. ICC*, 723 F.2d 346 (3d Cir. 1983); *Utah Power*, *supra*. The obvious central purpose again, as in the Staggers Act itself, is uniformity of standards. Yet the decision below permits an uncertified state unilaterally to diminish the coverage of a federal exemptive regulation, so as to create two different regimes for interstate and intrastate traffic.

7. The Fifth Circuit justified construing "transportation provided by a rail carrier" more narrowly for intrastate traffic than for interstate traffic solely because of the "potential mischief" of having a "small intrastate rail carrier" provide minimal intra-urban rail service, enabling it to provide extensive connecting intrastate truck service without state rate regulation (App. 6a-7a, *infra*). The decision below erroneously assumes that the ICC has rail jurisdiction over the hypothetical[17] intra-San Antonio railroad. This assumption is plainly wrong. See, *e.g.*, *Magner-O'Hara Scenic Ry. v. ICC*, 692 F.2d 441 (6th Cir. 1982). Compare *Texas*, *supra*, 730 F.2d at 357 (emphasis added), which recognized that the Staggers Act's pre-emptive scheme is addressed to "regulat[ion] of the intrastate rates of *interstate* railroads." Yet the ICC's ability to exempt such an isolated intra-city railroad (and with it, connecting railroad-provided truck service) was the sole "mischief" requiring in the eyes of the Fifth Circuit a new definition of "transportation provided by a rail carrier" at the

---

[17] In fact, all carriers involved in this case were sizable *interstate* carriers who performed TOFC/COFC service inside Texas. See App. 16a, 24a n.1.

intrastate level. This "mischief" is, under the holding of *Magner-O'Hara*, nonexistent.[18]

CONCLUSION

Review by this Court is necessary to correct the erroneous jurisdictional ruling of the Fifth Circuit and to eliminate the conflict between that court's decision below and the earlier decisions of the District of Columbia, Seventh and Sixth Circuits.

However, should this Court decide not to grant plenary consideration of this case, the clearly erroneous treatment of the transportation involved as "motor carriage," contrary to prior decisions of this Court, coupled with the other patent errors outlined above, merit summary reversal of the court of appeals' judgment.

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

H. GLENN SCAMMEL
Attorney
Interstate Commerce Commission

JANUARY 1986

---

[18] The decision is *Magner-O'Hara* is consonant with *Illinois Commerce Commission, supra,* where the District of Columbia Circuit recognized that the Staggers Act does not affect states' power to regulate an "aspect of intrastate commerce [that] does not cause sufficient interstate effects to be deemed 'interstate commerce' within the meaning of the commerce clause." 749 F.2d at 878 n.4.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 497619 21007